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19 Attorneys for Defendant  
20 LEROY BACA

21 UNITED STATES DISTRICT COURT  
22 FOR THE CENTRAL DISTRICT OF CALIFORNIA

23 UNITED STATES OF AMERICA,

24 Plaintiff,

25 v.

26 LEROY BACA,

27 Defendant.

Case No. CR 16-66(A) - PA

NOTICE OF MOTION AND  
MOTION OF DEFENDANT LEROY BACA TO DISMISS COUNTS ONE  
AND TWO OF THE FIRST  
SUPERSEDING INDICTMENT ON  
DOUBLE JEOPARDY GROUNDS  
[UNDER SEAL]

Hearing Date: February 6 or 13, 2017  
Hearing Time: TBD  
Courtroom: 9A

28 To the Clerk of the Court, and all parties and their counsel of record,  
PLEASE TAKE NOTICE THAT on February 6 or 13, 2017 at a time to be set by

1 United States District Court at 350 West First Street, Los Angeles, California,  
2 Defendant LEROY BACA, by and through his counsel of record, will and hereby  
3 does move the Court for an order dismissing Counts One and Two of the First  
4 Superseding Indictment on double jeopardy grounds.

5 The motion is based on jeopardy having attached after the jury was sworn in  
6 the first trial commencing on December 7, 2016, and the Court improperly granting  
7 a mistrial -- that Mr. Baca opposed -- based on manifest necessity. The motion is  
8 based on this Notice of Motion, the Memorandum of Points and Authorities and  
9 exhibits attached hereto, the files and records of the case and such further and  
10 additional evidence and argument as may be presented at the hearing on the motion.

11 Respectfully submitted,

12  
13 Dated: January 18, 2017

MORGAN, LEWIS & BOCKIUS LLP

14  
15 By /s/ Nathan J. Hochman  
16 Nathan J. Hochman  
17 Attorneys for Defendant  
18 LEROY BACA  
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1                                    **MEMORANDUM OF POINTS AND AUTHORITIES**

2        **I.        PROCEDURAL AND FACTUAL BACKGROUND**

3            Mr. Baca was charged in a three-count First Superseding Indictment on  
4        August 5, 2016. *See* ECF No. 70. On December 2, 2016, the Court, on the  
5        government's motion and over Mr. Baca's objection, severed Count Three charging  
6        false statements allegedly given to the government by Mr. Baca on April 12, 2013  
7        during a 4.5 hour interview from Counts One and Two charging a conspiracy and  
8        obstruction of justice occurring in August-September 2011. *See* ECF No. 190. The  
9        trial on Counts One and Two began on December 5, 2016 with jury selection;  
10       continued on December 7, 2016 when the jury was sworn; and ended on December  
11       22, 2016 when the Court declared a mistrial based on manifest necessity, which Mr.  
12       Baca opposed.

1 Later on December 22, 2016, the Court received another note:  
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7 The Court recessed for ten minutes to allow the Court and parties to  
8 analyze the situation.

9 Upon return to sidebar, the Court advised,  
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17 The Court then addressed the jury, asking the foreperson, “In your opinion, is  
18 the jury unable to reach a verdict as to one or more counts?” Tr. of Proceedings on  
19 Dec. 22, 2016, a true and correct copy of which is attached as **Exhibit B**, at 19:1-2  
20 (emphasis added). The foreperson responded, “Yes.” *Id.* at 19:3. When asked as a  
21 group whether anyone disagreed, no juror raised his hand. *Id.* at 19:4-9. The Court  
22 then asked the foreperson, “Sir, is there a reasonable probability that the jury could  
23 reach a unanimous verdict if sent back into the jury room for further deliberations?”  
24 *Id.* at 19:10-13. The foreperson responded, “No, your honor.” *Id.* at 19:14. When  
25 asked as a group whether anyone disagreed, no juror raised his hand. *Id.* at 19:16-  
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1 At sidebar,

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11 After the Court ordered the mistrial over  
12 defense objection, the Court dismissed the jury. *See Exh. B* at 22:7-9.

13 **II. ARGUMENT**

14 **A. DOUBLE JEOPARDY PREVENTS A RETRIAL OF COUNTS**  
15 **ONE AND TWO OF THE FIRST SUPERSEDING**  
16 **INDICTMENT AND MANDATES THEIR DISMISSAL**

17 It is undisputed that jeopardy attached to Counts One and Two in Mr. Baca's  
18 first trial when the jury was sworn on December 7, 2016, and that unless the Court  
19 properly found manifest necessity to declare a mistrial, that double jeopardy  
20 prevents a second trial on those counts and mandates their dismissal. As elaborated  
21 below, the Court's order of a mistrial was not supported by "manifest necessity" to  
22 a "high degree" because the Court did not exercise four options to determine  
23 whether the jury was genuinely deadlocked: (1) the Court did not re-read the  
24 "reasonable doubt" instruction; (2) the Court did not issue the Ninth Circuit's  
25 modified *Allen* charge; (3) the Court did not poll the jury regarding the prospect of  
26 reaching a verdict; and (4) the Court did not inquire whether the jury was  
27 unanimous on either of the counts.

1                               **1.      Legal standard**

2               The government may not put a defendant in jeopardy twice for the same  
3 offense. *See Benton v. Maryland*, 395 U.S. 784, 811 (1969). “Because jeopardy  
4 attaches before the judgment becomes final,” the constitutional protection against  
5 double jeopardy “embraces the defendant's valued right to have his trial completed  
6 by a particular tribunal.” *Arizona v. Washington*, 434 U.S. 497, 504 (1978). This is  
7 because “a second prosecution may be grossly unfair[,] increases the financial and  
8 emotional burden on the accused, prolongs the period in which he is stigmatized by  
9 an unresolved accusation of wrongdoing, and may even enhance the risk that an  
10 innocent defendant may be convicted.” *Id.* Consequently, as a general rule, “the  
11 prosecutor is entitled to one, and only one, opportunity to require an accused to  
12 stand trial.” *Id.* at 505.

13               A trial judge, however, “may discharge a *genuinely deadlocked* jury and  
14 require the defendant to submit to a second trial” if “manifest necessity” justifies  
15 the jury’s dismissal. *Id.* at 509 (emphasis added). If the judge “discharges the jury  
16 when further deliberations may produce a fair verdict,” the defendant is deprived of  
17 his “valued right” to be tried by a particular jury. *Id.* Accordingly, in the event of a  
18 jury’s discharge over the defendant’s objection, “the prosecutor must shoulder the  
19 burden of justifying the mistrial if he is to avoid the double jeopardy bar.” *Id.* at  
20 505. The “manifest necessity” standard “appropriately characterize[s] the  
21 magnitude of the prosecutor's burden.” *Id.* Although there are varying levels of  
22 necessity, the Supreme Court requires “a high degree before concluding that a  
23 mistrial is appropriate.” *Id.* at 506.

24               There are no concrete factors for determining whether “manifest necessity”  
25 justifies the discharge of a deadlocked jury, or whether such deadlock is  
26 surmountable. Justice Story offers the classic formulation:  
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[Trial courts] are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.

*Id.* at 506 n. 18 (citing *United States v. Perez*, 22 U.S. 579, 580 (1824)). The trial court takes “all circumstances into consideration.” *Id.* The guiding principles of *Perez*, then, “forbid the mechanical application of an abstract formula.” *United States v. See*, 505 F.2d 845, 852 (9th Cir. 1974). The jury's own statement that it is unable to reach a verdict, however, “is the most critical factor.” *United States v. Salvador*, 740 F.2d 752, 755 (9th Cir. 1984).

There are many other factors to consider including the length and complexity of the trial, the length of jury deliberations relative to the length of trial, and whether the exhaustion of the jury would induce a minority to change their vote to a verdict they would not otherwise support. *See, e.g., See*, 505 F.2d at 851-52. Many reviewing courts have considered whether the trial judge gave the jury an *Allen* charge before terminating deliberations. *See, e.g., Salvador*, 740 F.2d at 755; *see also United States v. Therve*, 764 F.3d 1293, 1299 (11th Cir. 2014); *United States v. Capozzi*, 723 F.3d 720, 728 (6th Cir. 2013); *United States v. Felton*, 262 Fed.Appx. 195, 199 (11th Cir. 2008); *United States v. Joyner*, 201 F.3d 61, 82 (2nd Cir. 2000); *Hameed v. Jones*, 750 F.2d 154, 162 (2nd Cir. 1984); *Rogers v. United States*, 609 F.2d 1315 (9th Cir. 1979); *United States v. Horn*, 583 F.2d 1124, 1129 (10th Cir. 1978); *United States v. Perez*, 565 F.2d 1227, 1233 (2nd Cir. 1977); *United States v. Goldstein*, 479 F.2d 1061, 1069 (2nd Cir. 1973). In *Felton*, 262 Fed.Appx at 199, one reason the court concluded the trial court erred in determining the jury was deadlocked was because “the [trial judge] did not give an *Allen* charge to encourage the jury to reach a unanimous verdict.” Furthermore, giving an *Allen* charge is proper “in all cases except those where it's *clear from the record* that the charge had

1 an impermissibly coercive effect on the jury.” *United States v. Ajiboye*, 961 F.2d  
2 892, 893 (9th Cir.1992) (emphasis added).

3 Courts also consider whether the jury was polled. *See, e.g., United States v.*  
4 *See*, 505 F.2d 845, 852 (9th Cir. 1974). In *See*, the court mentioned that the trial  
5 judge did not “poll the jurors individually with respect to the prospect of reaching a  
6 verdict.” *Id.* The defendants there, however, did not request a jury poll in the  
7 district court, so the analysis appears truncated. *Id.*

8 Finally, in trials with more than one count, courts have considered whether  
9 the trial judge asked a deadlocked jury if it was unanimous on any count, rather  
10 than on all counts. *See, e.g., United States v. Razmilovic*, 507 F.3d 130, 139 (2nd  
11 Cir. 2007); *see also United States v. Ross*, 626 F.2d 77, 81 (9th Cir. 1980); *United*  
12 *States v. Armstrong*, 654 F.3d 1328, 1333 (9th Cir. 1980). As regards partial  
13 verdicts, juries “should understand their options, especially when they have reached  
14 a stage in their deliberations at which they may well wish to report a partial verdict  
15 as to some counts[.]” *United States v. DiLapi*, 651 F.2d 140, 147 (2nd Cir. 1981).  
16 Defendants, after all, enjoy the right to have as many charges as possible disposed  
17 of by “a particular tribunal.” *Washington*, 434 U.S. at 504. In *Razmilovic*, 507 F.3d  
18 at 139, the court reversed the trial judge’s finding of manifest necessity for, among  
19 other things, failing to ask the jury “whether it was deadlocked with respect to all  
20 defendants on all counts.”

## 21 **2. It Was Not Manifestly Necessary To Dismiss Mr. Baca’s** 22 **Jury And Declare A Mistrial**

23 Here, as noted above, the mistrial was not supported by “manifest necessity”  
24 to a “high degree” because the Court did not exercise four options to determine  
25 whether the jury was *genuinely* deadlocked: (1) the Court did not re-read the  
26 “reasonable doubt” instruction; (2) the Court did not issue the Ninth Circuit’s  
27 modified *Allen* charge; (3) the Court did not poll the jury regarding the prospect of  
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1 reaching a verdict; and (4) the Court did not inquire whether the jury was  
 2 unanimous on either of the counts.

3 **First**, the Court should have re-read the “reasonable doubt” instruction.  
 4 Where “a jury makes known its difficulty and requests further instructions on the  
 5 law applicable to an important issue, the trial judge is required to give such  
 6 supplemental instructions as may be necessary to guide it in the determination of  
 7 the issue.” *Walsh v. Miehle-Goss-Dexter, Inc.*, 378 F.2d 409, 415 (3rd Cir. 1967)  
 8 (citing *Bollenbach v. United States*, 326 U.S. 607, 611(1946)). Re-reading a portion  
 9 of the jury instructions is well within the trial court’s available remedies for jury  
 10 confusion or obstinacy. *See, e.g., United States v. Vue*, 423 Fed.Appx. 623, 625 (9th  
 11 Cir. 2011).

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 15 The  
 16 instruction was as follows:

17 Proof beyond a reasonable doubt is proof that leaves you firmly  
 18 convinced that a defendant is guilty. It is not required that the  
 19 government prove guilt beyond all possible doubt. A reasonable doubt  
 20 is a doubt based upon reason and common sense and is not based  
 21 purely on speculation. It may arise from careful and impartial  
 consideration of all the evidence for from lack of evidence

22 If after careful and impartial consideration of all the evidence, you are  
 23 not convinced byond a reasonable doubt that the defendant is guilty, it  
 24 is your duty to find the defendant not guilty. On the other hand, if  
 25 after careful and impartial consideration of all the evidence, you are  
 convinced beyond a reasonable doubt that the defendant is guilty, it is  
 your duty to find the defendant guilty.

26 *See* ECF No. 212 at 5.

1 The court had re-read one jury instruction before dealing with the lawfulness  
2 of the Sheriff's Department investigation, *see id.* at 17,  
3 emphasizing that the jury should not single out this  
4 instruction but consider all the instructions  
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10 **Second**, the Court should have given the jury the modified Ninth Circuit  
11 *Allen* charge (Model Jury Instruction 7.7). An *Allen* charge is a typical "next step"  
12 when a jury expresses difficulty in reaching a verdict. *See Ajiboye*, 961 F.2d at 893.  
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22 As such, the record does not indicate that any other juror was aware of Juror No.  
23 12's particular grievance nor did the Court inquire of Juror No. 12 whether other  
24 jurors were aware of her bringing her particular grievance to the Court's attention.  
25 Because the record did not support a finding  
26 a modified *Allen* charge would have been proper.  
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1 the jury's statement of being deadlocked -- the Court's failure to take other steps  
 2 requested by the defense renders the finding of manifest necessity improper. Those  
 3 additional steps, that courts have approved of that were not taken by the Court,  
 4 included ensuring that the jury understood it could reach a verdict on either count  
 5 even if it could not reach a verdict on both counts, individually polling the jury,  
 6 giving the jury an *Allen* charge, and re-reading a jury instruction over which  
 7 confusion had been indicated. Since there was no manifest necessity to declare the  
 8 mistrial, double jeopardy prevents the government from retrying Mr. Baca on  
 9 Counts One and Two and mandates that these counts be dismissed on double  
 10 jeopardy grounds.

11  
 12 Dated: January 18, 2017

MORGAN, LEWIS & BOCKIUS LLP

13  
 14 By /s/ Nathan J. Hochman  
 15 Nathan J. Hochman  
 16 Attorneys for Defendant Baca  
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